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MEMORANDUM

VIA FACSIMILE AND FEDERAL EXPRESS

To: Chairman Liane Randolph
Commissioners Downey, Karlan, Knox and Swanson

From: James C. Harrison
Stephen J. Kaufman, Smith Kaufman LLP

Date: July 23, 2003

Re: Recall Election Contribution Limits

BACKGROUND

At its last meeting, the Commission unanimously adopted Regulation 18531.5, which codified its earlier advice concerning Proposition 34's recall provision, Government Code section 85315. The Commission also agreed to consider two additional questions not explicitly addressed in the regulation:

> (1) May the target of a recall use funds raised under section 85315 on communications solely to attack a replacement candidate or must such communications also contain an explicit exhortation against the recall?
>
> (2) May a committee formed to support the recall, controlled by a replacement candidate, accept unlimited contributions to attack the recall target or promote the replacement candidate's own candidacy?

The answers to these questions are dictated by the constitutional and statutory provisions governing recalls, the Commission's previous advice, and other provisions of the Political Reform Act:

> (1) Yes. The target of a recall may use unrestricted funds for communications opposing a replacement candidate, regardless of whether the communication includes an explicit exhortation against the recall, because a crucial element of the target's defense of the recall is to demonstrate that none of the replacement candidates is better qualified than the target. By attacking the replacement candidates, the target is opposing the recall within the meaning of Government Code section 85315. The target is not required to include an explicit exhortation against the recall, because the decision to recall the target cannot be separated from the election of a successor.
>
> (2) No. A replacement candidate is subject to contribution limits under Proposition 34. Any expenditures by a committee controlled by a replacement candidate would, by definition, be at the behest of the candidate. The committee's receipts and expenditures would therefore be subject to the contribution limits imposed on replacement candidates, because the nature of the committee would change from a committee primarily formed to support a ballot measure committee to a committee that makes contributions to candidates.

ANALYSIS

A. History of the Recall

A number of clarifications are in order concerning the nature of a state recall election. Since its inception, the recall of a state officer has always been conducted as a single election that poses two questions on the same ballot: shall the incumbent be recalled, and if so, who shall be elected to replace the incumbent?

California voters approved a constitutional amendment authorizing the recall of public officers in 1911. (Senate Constitutional Amendment No. 23, October 10, 1911, Exh. A.) Article XXIII provided:

> There shall be printed on the recall ballot, as to every officer whose recall is to be voted on thereat, the following question: "Shall

> (name of person against whom the recall petition is filed) be recalled from the office of (title of the office)", following which question shall be the words "Yes" and "No" on separate lines, with a blank space at the right of each, in which the voter shall indicate, by stamping a cross (X), his vote for or against such recall. *On such ballots, under each such question, there shall also be printed the names of those persons who have been nominated as candidates to succeed the person recalled, in case he shall be removed from office by said recall election*; but no vote cast shall be counted for any candidate for said office unless the voter also voted on said question of the recall of the person sought to be recalled from said office. The name of the person against whom the petition is filed shall not appear on the ballot as a candidate for the office. If a majority of those voting on said question of the recall of any incumbent from office shall vote "No," said incumbent shall continue in said office. If a majority shall vote "Yes," said incumbent shall thereupon be deemed removed from such office, upon the qualifications of his successor. The canvassers shall canvass all votes for candidates for said office and declare the result in like manner as in a regular election. If the vote at any such recall election shall recall the officer, then the candidate who has received the highest number of votes for the office shall be thereby declared elected for the remainder of the term. In case the person who received the highest number of votes shall fail to qualify within ten days after receiving the certificate of election, the office shall be deemed vacant and shall be filled according to law.
>
> (*Id.*, emphasis added.)

The voters have amended the recall provision several times since 1911. In 1974, for example, the voters approved Proposition 9, which amended the Constitution to limit the signature-gathering phase of a recall to 160 days. (Proposition 9, November 5, 1974, Exh. B.)[1]

[1] In a June 25, 2003, memorandum to the Commission, staff advised the Commission that voters changed the way the recall works in 1994 by adopting Proposition 183. "Prior to 1994, the vote on whether to remove an elected official from office, and if the recall succeeded, the subsequent election to choose a successor candidate were held separately." Proposition 183, however, amended the Constitution to permit a recall election to be consolidated with a general election if the recall qualified within 180 days of the election. (Proposition 183, November 8, 1994, Exh. C.) Proposition 183 did not modify the manner in which the recall election was conducted. Since 1911, an election to recall a state officer has included the election of his replacement.

At all times since 1911, however, the Constitution has provided for a single election to determine whether a state officer should be recalled, and if so, who should be elected to replace him. Under the California Constitution, the recall of a state officer and the election of a replacement candidate are indivisible.[2]

B. The Political Reform Act and Recall Elections

The Political Reform Act treats a recall election as a hybrid election. The Act includes a recall within the definition of "measure," but the target of a recall, and the candidates who seek to replace him, are "candidates." (Gov. Code, §§ 82043, 82007.) Under United States Supreme Court precedent, limits on contributions to ballot measure committees are unconstitutional. (*Citizens Against Rent Control v. City of Berkeley* (1981) 454 U.S. 290, 297.) Candidates, however, may be subject to contribution limits. (*Buckley v. Valeo* (1976) 424 U.S. 1, 20.)

For many years, the FPPC struggled with the apparent inconsistency between the definition of "measure" and the definition of "candidate" and how to fit recall elections into one or the other. Proposition 34 resolved this confusion by acknowledging that recall elections share characteristics of both, but at bottom, are a unique occurrence in the law. Thus, Proposition 34 expressly authorizes officeholders who are served with a recall notice to establish a committee and raise funds without restriction to oppose the recall. Government Code section 85315(a) provides:

> Notwithstanding any other provision of this chapter, an elected state officer may establish a committee to oppose the qualification of a recall measure, and the recall election. This committee may be established when the elected state officer receives a notice of intent to recall pursuant to Section 11021 of the Elections Code. An elected state officer may accept campaign contributions to oppose the qualification of a recall measure, and if qualification is successful, the recall election, without regard to the campaign contributions limits set forth in this chapter. The voluntary expenditure limits do not apply to expenditures made to oppose the qualification of a recall measure or to oppose the recall election.

[2] Local recall elections are conducted under statutes adopted by the Legislature and under local charters. (Cal. Const., art. II, § 19.)

By contrast, Proposition 34 imposes limits on contributions to replacement candidates. (Gov. Code, § 85301.) A candidate who wishes to replace the Governor, for example, may not accept contributions in excess of $21,200 from a single contributor. (*Id.*)

This scheme reflects a legislative determination to promote government stability and to avoid repetitive elections. A recall election is both costly and disruptive. If the recall of the Governor qualifies for the ballot before September 4, 2003, for example, it will cost California taxpayers at least $30 to $40 million (Secretary of State, "Recall Fact Sheet," http://www.ss.ca.gov/elections/elections_recall_faqs.htm.) If replacement candidates were permitted to raise unlimited funds in a recall election, there would be a considerable incentive for candidates to run in a recall election, rather in a regular election in which they would be subject to contribution limits. This, of course, would undercut the purpose of Proposition 34.

The State also has an interest in government stability. Permitting replacement candidates to avoid the contributions limits in a recall election would tend to promote successive recall elections.

Thus, the aptly named "target" has the ability to fight back against those who seek to recall him while replacement candidates must abide by applicable contribution limits.

C. <u>The Recall is a Single Election</u>

In March, the Commission adopted a fact sheet that confirms the plain language of sections 85315 and 85301. Last month, the Commission adopted a regulation to codify its conclusion. (Cal. Code Regs., tit. 2, § 18531.5.) Both the fact sheet and the regulation properly treat a recall election as a single election.

The Commission's approach is consistent with political realities. The decision to recall the target officer cannot be distinguished from the decision to elect a successor. The first decision, of course, is a precondition of the second decision: a replacement candidate cannot succeed the target unless the target is recalled. But the outcome of the first decision is also dependent in part upon the second question: if the voters are not convinced that a replacement candidate would be superior to the target, they will be less inclined to recall the target. It is therefore impossible to disentangle the two decisions. A target officer may oppose the recall by lauding his own accomplishments or by attacking his would-be successors. Both messages are

part and parcel of a campaign against a recall.[3] The same, of course, is also true of a replacement candidate. He may either attack the target or he may discuss his qualifications, but both messages are part of a campaign to succeed the target.

D. Existing Provisions of the Political Reform Act Adequately Address the Questions Posed by the Public

With this background in mind, the answers to the questions raised in the July meeting are found in the Political Reform Act and the Commission's regulations.

> (1) May the target of a recall use funds raised under section 85315 (and thus not subject to Proposition 34's candidate contribution limits) on communications that attack a replacement candidate and/or do not expressly advocate the defeat of the recall?

The answer is yes. Under Government Code section 85315, the target of a recall may accept unlimited contributions "to oppose the qualification of a recall measure, and the recall election." Nothing in that statute limits the manner in which the target may oppose the recall election. Under the California Constitution, a "recall election" is a single election comprised of two indivisible questions: should the officer be recalled and if so, who should replace him or her? Based on the plain language of Proposition 34 and the Constitution, a target officer may use unrestricted funds on communications that are directed toward defeating the recall, regardless of whether those communications attack a replacement candidate or expressly advocate the defeat of the recall.[4]

[3] At the last Commission meeting, some members of the audience raised the question of how to treat communications made by the target in support of a replacement candidate. This is a red herring. A target candidate who wishes to remain in office will direct his or her resources toward defeating the recall, not toward electing someone whose candidacy is premised on the success of the recall. While the current gubernatorial recall proceedings have led to countless hours of supposition and spin, these musings are theoretical and bear no relation to the practical realities faced by a recall target.

[4] Any effort to compel the target's officer's speech, of course, would infringe on his First Amendment rights. Requiring an explicit exhortation against the recall would also be inconsistent with political realities. Because voters do not like being told how to vote, most political ads do not even include an explicit exhortation. Rather, campaign commercials often contain a tag line or slogan that summarizes how the campaign desires voters to perceive the candidate or his or her opponent.

(2) May a committee formed to support the recall, controlled by a replacement candidate, accept unlimited contributions to attack the target or to promote the candidate?

The answer is no. Under the Political Reform Act and the Commission's past advice, a candidate may control a ballot measure committee. (*Mathys* Advice Letter, FPPC File No. I-00-068, 2000 WL 690290, *2 (2000).) Ballot measure committees are not subject to contribution limits. (*Citizens Against Rent Control v. City of Berkeley* (1981) 454 U.S. 290, 297.) Based on these rulings, the Commission preliminarily has agreed that a committee formed to support the recall may therefore accept unlimited contributions, even when controlled by a replacement candidate.

Because the candidate controls the committee, however, the committee's expenditures are, by definition, at his behest. (Cal. Code Regs., tit. 2, § 18225.7.) If the committee makes expenditures for communications that expressly advocate the defeat of the target, or support the candidacy of the replacement candidate, those expenditures would be in-kind contributions to the replacement candidate. The committee's receipts and expenditures would therefore be subject to the contribution limits imposed on replacement candidates, because the nature of the committee would change from a committee primarily formed to support a ballot measure to a committee that makes contributions to a state candidate.

This would be the case even if the committee paid for an ad that did not even mention the replacement candidate. Because the success of a replacement candidate is contingent upon the recall of the target, and because the committee is controlled by a replacement candidate, such a communication would be considered an in-kind contribution by the committee to the replacement candidate. It would, therefore, be subject to the contribution limits imposed on replacement candidates (*i.e.*, $21,200 for candidates for Governor).

In the unique context of a statewide recall, the Commission has the authority to interpret Proposition 34 as prohibiting replacement candidates from controlling recall committees.[5] Allowing their use leaves open the very real possibility of the recall committee

[5] Under regulation 18215(c)(7), a payment made by a ballot measure committee for a communication that features a candidate is not considered to be a contribution to the candidate, as long as the communication does not expressly advocate the election of a candidate. (*See also Leidigh* Advice Letter, FPPC File No. A-90-669.) A communication by a recall election committee controlled by a replacement candidate, however, necessarily advocates the candidate's election, even if it does not mention his candidacy, because the election of a successor is contingent upon the recall of the target. The replacement candidate cannot be elected unless the target is recalled.

becoming a conduit for unlimited contributions that, in fact, support the replacement candidate, either by advocating the recall, disparaging the target, or touting the qualifications of the candidate.[6]

Independent committees formed to support or oppose the recall are considered to be ballot measure committees. They may therefore accept unlimited contributions. However, if an independent recall committee makes expenditures at the behest of a replacement candidate for a communication that expressly advocates the election of the replacement candidate, its expenditures would be subject to the contribution limits imposed on replacement candidates.

CONCLUSION

A recall election is unique, but existing provisions of the Political Reform Act adequately address the issues raised last month. The Commission should resist the invitation to disrupt the clear statutory scheme by parsing communications regarding the recall of the target officer from communications regarding the election of his or her replacement.

[6] It should go without saying, of course, that recall committees controlled by a replacement candidate cannot use unlimited funds for communications that discourage voters from electing any other replacement candidates, because such communications clearly promote the candidacy of the replacement candidate controlling the committee.